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Environmental Law

U.S. EPA and Corps of Engineers propose new waters of the U.S. rule

As we have reported on previously in this column, on Feb. 28, 2017, President Donald Trump issued an Executive Order directing the U.S. Environmental Protection Agency (EPA) and the Corps of Engineers to review and rescind the 2015 "waters of the United States" rule that was issued under the Clean Water Act. The rule has been subject to extensive litigation nation-wide at the federal District and Court of Appeal level where it has been challenged by various industry, agriculture, development groups and affected states.

The agencies decided to take a two-step process regarding the waters of the U.S. rule. Step one is the repeal of the 2015 rule and recodification of the regulation in place prior to 2015. Step two is a substantial analysis and revision of the definition of the water of the U.S. rule. On Dec. 11, 2018. the EPA and Corps took the second step by proposing a revised definition of "waters of the U.S." to address federal jurisdiction under the Clean Water Act.

The proposed rule was published in the Federal Register on Feb. 14, 2019, and will be subject to a 60-day public comment period. The public comment period close on April 15, 2019. As part of the public comment and outreach, the agencies held a webcast on the rule in February and also held a public hearing on the rule in February 2019.

At the time it was announced Acting EPA Administrator Andrew Wheeler stated that "[o]ur proposal would replace the Obama EPA's 2015 definition with one that respects the limits of the Clean Water Act and provides states and landowners the certainty they need to manage their natural resources and grow local economies…For the first time, we are clearly defining the difference between federally protected waterways and state protected waterways." The agencies believe that the proposed rule will be more easy to understand and provide "clarity, predictability and consistency so that the regulated community can easily understand where the Clean Water Act applies — and where it does not."

By GEORGE S. VAN NEST
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As was indicated in President Trump's Executive Order, the revised rule was written in accordance with the plurality decision of Justice Scalia in *Rapanos v. United States,* 547 U.S. 715 (2006). That opinion differed from the concurring opinion of Justice Kennedy that provided non-navigable waters that could be subject to jurisdiction included those that had a significant nexus to navigable waters, which was followed in the Obama era rule. Conversely, Justice Scalia's opinion, which is a basis for the new rule, provided that only waters which are relatively permanent, standing or continuously flowing and form geographic features that meet the common definition of "streams, oceans, rivers and lakes" qualify as waters of the United States under the Clean Water Act.

Specifically, under the proposed rule Clean Water Act jurisdiction would apply to traditional navigable waters, tributaries to those waters, certain ditches, certain lakes, and ponds, impoundments of jurisdictional waters, and wetlands adjacent to jurisdictional waters would be federally regulated. Conversely, it also details what do not constitute "waters of the United States" such as features that only contain water during or in response to rainfall (e.g., ephemeral features), groundwater, many ditches, including most roadside or farm ditches, prior converted cropland, stormwater control features, and waste treatment systems.

Although some waters will fall outside of federal jurisdiction, the agencies recognize that there are existing state and tribal regulations that may apply to such waters. Hence, the agencies believe the proposed rule will respect state regulation of local waters "while protecting the nation's navigable waters as intended by Congress when it enacted the Clean Water Act."

The proposed rule defines tributary to include "a river, stream or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a traditional navigable water or territorial sea in a typical year." In a departure from the 2015 Obama rule, the definition does not include temporary flows and features that are dry most of the year and only contain water during rain events.

The rule also addresses what constitutes an "adjacent" wetland, namely wetlands that "abut or have a direct hydrologic surface connection" to a regulated water in a normal year. In order to qualify under the proposed rule, the wetland must abut one point or side of a regulated water subject to jurisdiction. In addition, a direct hydrologic connection requires flow or inundation from a regulated water to the wetland or an intermittent flow between the water and wetland. In either scenario, to fall within the definition under the proposed rule there must be an actual connection.

Until the rule is finalized the agencies will continue to implement the program under the 1986/1988 regulatory definition of "waters of the U.S." The Clean Water Act "waters of the U.S." rule is a complex rule that has a broad impact on U.S. business and residents that buy, sell, develop, farm and use property in proximity to waterbodies and wetlands. As with any complicated rule-making process, interest groups on both sides are active in support and opposition to the proposed changes. Regardless of the substance of the final waters of the U.S. rule, it is certain that there will be challenges brought to prevent the changes from being implemented.

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